Planning and the People Problem (1)

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Introduction

The proper place of the public in planning decisions is a perennial debate but two events make a re-examination of the issue of topical importance; the Government's Planning Bill[2], which will become law later this year, and publication of the White Paper Communities in Control in July.[3] The Planning Bill in particular raises profound issues, not least the dissolution of the post-war settlement in which the democratic accountability of planning decisions guaranteed their legitimacy. This paper seeks to explore the future role of the public in the planning system in the context of the Government's planning reform agenda. The discussion seeks to address two sets of issues:

1. Despite the rhetoric of increased public involvement, the planning system has been subject to a reform agenda which assumes that people are a ''problem'' to UK competitiveness. A number of myths about the nature of delay have built up and driven reform measures which seek to replace accountability and citizen rights with a model of public 'involvement' that is vague and not subject to clear lines of redress. Overall, the government agenda has been to elevate competiveness above public legitimacy. It is interesting to reflect not just on the moral, legal and political aspects of this question, but also on whether it really will deliver a process which is faster for business given the public dissent it is likely to generate.
2. Is it possible to set out a lasting settlement for planning in which its overall purpose to regulate the use of land in the public interest is supplemented by a clear understanding of the importance of accountability and rights at all tiers of the planning framework?

In exploring the first theme, the paper will outline the impact of the Planning Bill on established rights to participate and the removal of democratic accountability. It will draw on legal advice commissioned by Friends of the Earth as to the vulnerability of the system to legal challenge—a factor likely to increase ''delay''. The paper will also seek to highlight the unprecedented legislative powers of the new Infrastructure Planning Commission (IPC) and the wider constitutional issues this raises.

In exploring the second theme, the paper will conclude by suggesting the need for a period of settled census over the purpose of planning and the place of public participation. Amongst individual measures this also requires building a new coalition of interests in which planning organisations, businesses, NGOs and the legal community should play a much more active role.

The evolution of public participation in planning

The UK planning system was a pioneer of active citizen participation. From the 1947 Town and Country Planning Act planning decisions were ultimately in the hands of local and national politicians rather than in the hands of professional planners. The creation of a legal right to be heard

[1] Acknowledgments. With grateful thanks to; Phil Michaels, Naomi Ludhe-Thompson, Jenny Lopez and the JPLC advisory group.

[2] The Planning Bill 2008.

[3] Communities in control: real people, real power CLG 9 July 2008.

in development plan inquiries was one tangible step forward, but the 1969 Skeffington Report[4] provided a pioneering and holistic assessment of community participation. Despite radical progress in participation techniques with the development of tools such as ''Planning for Real'',[5] the debate on participation in planning was not marked by significant policy innovation in the 1980s. The 1990 and 1991 Planning Acts confirmed existing rights and gave added weight to the development plan, but this period was also marked by increasing levels of activism and legal challenge. There were also notable large scale, albeit rare, set piece public inquiries such as Sizewell B and Heathrow T5.

As with many other aspects of environmental regulation, Europe has been the source of significant recent innovation. The Aarhus Convention[6] offers one of the few coherent frameworks of citizens rights in environmental decision making and the Convention itself has been implemented in the EU through a series of directives.[7] Some of these have been transformative, such as freedom of information, but there has been much less progress on participation and access to justice. This is perhaps because the implications of these two subjects are even more challenging to governments. The Human Rights Act (1998) has also been a significant development. However, despite a good deal of argument its direct impact on planning decisions so far has been limited.[8] This will undoubtedly change with the introduction of the 2008 Planning Bill.

Swirling around these legal frameworks we have seen a large amount of rhetoric on community engagement from Government. This focuses on empowerment in service delivery and deliberately steers well clear of legally enforceable citizens rights. A variety of umbrella terms have been used to describe these initiatives which have appeared from diverse Government departments. ''New localisation'' was once fashionable and it remains to be seen if the new Empowerment White Paper[9] offers anything more coherent.

In the long evolution of the relationship between people and the planning system since 1947, by far the most radical single development has been the 2008 Planning Bill. The very challenging nature of its contents provides a very useful litmus test of the Government's real rather than rhetorical regard for ''community engagement''.

The Planning Bill

The Planning Bill, which was published in November 2007, was a response not just to political frustration with the planning process but to two investigations by Kate Barker and Rod Eddington.[10] Both reports made the case for speeding up the way we provide for major infrastructure. Both were hosted by the Treasury and both had an explicitly narrow remit not to examine the planning process in the round, but solely to explore its impact on competitiveness.[11] While the Planning Bill does deal with local planning issues the bulk of the contents set out a new regime for the approval of major

[4] The Skeffington Report 1969 ''Report of the Committee on Public Participation in Planning'' (HMSO).

[5] ''Planning for Real'' is comprehensive public participation technique developed by Tony Gibson and currently promoted by the Neighbourhood Initiatives Foundation.

[6] Aarhus Convention ''The Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters'' (UNECE 1998).

[7] Already in force: Directive 2003/4/EC (access to information) Directive 2003/35/EC (public participation) (both also contain some provisions on access to justice but don't implement that pillar of Aarhus in full). **Not yet completed:** A Directive on access to justice was proposed by the Commission in 2003 but is stuck in the EU legislative process (COM(2003) 624).

[8] Alconbury et al.

[9] This is also referred to as the Communities in Control White Paper.

[10] Barker Review of land use Planning. Final Report (TSO 2006). The Eddington Review of Transport Policy (TSO 2006).

[11] Kate Barkers terms of reference (To consider how. . .planning policy and procedures can better deliver economic growth. . .) can be found on page 1 of her final report.

infrastructure. The ambition of the Bill was set by the Secretary of State during the Bill's Second Reading on December 10, 2007:

> ''The Bill will reform the planning system to make it fairer, more efficient and ready to equip Britain for the challenges of the 21*st* century. It will speed up decisions on major projects that are vital to our economic future. Together with the Climate Change Bill and energy Bill, it will accelerate our transition to a low-carbon economy. At every stage it will reinforce the democratic principle that everyone should have a fair say on the future of their neighbourhood.''[12]
>
> ~Hazel Blears MP (Second Reading, December 10, 2007)

The Government's clear intention is to ''speed up'' the process by which nationally significant infrastructure projects are approved. Major infrastructure in this context includes those projects listed in cl.13(1) falling within the fields of energy, transport, water, waste water, and waste (but not housing).

In outline the new process will function as follows:

a. A series of National Policy Statements (NPS) will be prepared[13] setting out national policy in relation to specified descriptions of development. Amongst other things an NPS can set out the amount, type or size of development of that description which is appropriate nationally or for a specified area. The NPS may be location specific.[14]
b. Where a developer wishes to develop a nationally significant infrastructure project (or part of one)[15] he must apply for development consent.
c. A ''development consent'' is a ''unified consent'' so that when granted other types of consent are not required (e.g. planning permission, consents under the Pipelines Act 1962, the Gas Act 1965, the Energy Act 1976 etc).[16]
d. An application for development consent is to be determined by the Infrastructure Planning Commission (where a relevant NPS has been published and by the Secretary of State otherwise).[17]
e. A development consent application must be decided by the IPC ''in accordance with any relevant national policy statement'' other than in limited circumstances.[18,19]
f. Where the IPC decides to grant development consent then the order can include a range of matters including the creation or extinguishment of rights; compulsory purchase of land; discharge consents, etc.[20]

[12] HC Deb December 10, 2007 c.25.

[13] The Planning Bill Clause 5.

[14] Clause 5(5)(d) 'the policy set out in a national policy statement may in particular identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development.' Under sub-para (b) it can set out criteria for deciding whether locations are suitable.

[15] Clause 30: Development consent is required for development to the extent that the development forms part of a nationally significant infrastructure project.

[16] See Clause 32(1)(a) for a full list.

[17] Clause 106 provides that the Secretary of State may recover an application for her own determination where there has been a significant change in the basis for the policy.

[18] Clause 101 sets out the circumstances in which the IPC may determine a planning application other than in accordance with the NPS for example, Clause 101(4) where deciding the application in accordance with the NPS would lead to the UK being in breach of its international obligations; or Clause 101(5) where such a determination would be unlawful by virtue of any enactment; or Clause 101(7) where the IPC 'is satisfied that the adverse impact of the proposed development would outweigh its benefits'.

[19] Clause 104: The application must be decided within three months of the six-month period for concluding the examination of the application.

[20] A non-exhaustive list of provisions that may be included in an order granting development consent is set out in Clause 116.

There are of course some positive aspects of this legislation. For example, a clear statement of national policy in relation to aviation, waste and energy supply would significantly assist all parties. Likewise, the concept of universal consent regimes which should simplify the process would be a valuable step forward for all participants.

However, those benefits are outweighed by the negative impact of the proposed reforms which will result in a system that is unaccountable and unfair and which will therefore ultimately result in decisions that command neither the acceptance nor the respect of the public. While it is not the focus of this paper it is worth noting that the Bill also fails to deliver on vital issues such as climate change.[21]

The underlying reason for these failures is that the current reforms start from the basis that ''people are the problem''. Although, the Government describes the problem as being ''delay'' that word is used as a euphemism for ''delay caused by public participation''.

The assumption is that the system is subject to delays that are caused by the involvement of members of the public. However, that assumption is not supported by published evidence. In fact it appears that there are multiple sources of delay in the types of projects in question. Terminal 5 became crucial to the case of those who demand greater speed. Whilst no one would suggest the length of that inquiry was good, the cause of the delay must be considered. Significant changes to surface access arrangements and a further 18 planning applications submitted after the inquiry began suggest that the promoter should bear significant responsibility for the delay.

The weakness of the evidence base behind the Bill leaves unanswered important questions both about the cause of ''delay'' and the extent to which the new system will deal with the issue. For example, 8 of the 11 inquiries given as examples in the Planning White Paper[22] lasted for less time than the proposed maximum under the Planning Bill. In all but one of the six examples of major infrastructure projects taken as case studies in the Barker report (which formed the ''evidence base'' for the Planning White Paper) the length of the inquiry was shorter than the subsequent decision making process (the only exception was T5) and an analysis[23] shows that in those five cases the inquiry comprised only between one-sixth and one-third of the period from application to decision. The evidence simply does not support the proposition that people are the problem.

In considering the question of timing the Government appears not to distinguish ''delay'' from ''due process'' and ''proper scrutiny''. The projects subject to the Bill are projects of national significance. They are inevitably very large. They are often hugely complex and have potentially very significant environmental impacts (local, regional, national and international). The Government has not given proper consideration as to whether it will be possible for some of the anticipated developments to be adequately dealt with in the timeframes mandated by the Planning Bill whilst ensuring proper scrutiny and environmental protection.

The absence of meaningful evidence based assessment is all the more puzzling in the context of the Government's major overhaul of the planning system in 2004 and in particular the 2005 Major Infrastructure Project Inquiries Procedure Rules which were intended to speed up the system.

[21] The Government rejected, both in Committee and at Report stage in the Commons, a modest amendment to impose a duty on the IPC to consider climate change in its deliberations.

[22] Planning for a Sustainable Future White Paper CLG 2007 para.2.8, table at p.32.

[23] See Keith Lindblom QC and Richard Honey: Planning for a New Generation of Power Stations [2007] J.P.L. 843 at 847.

It is a remarkable feature of the proposed legislation that the Government has not given the recently reformed system an opportunity to bed down; and has not gathered (or at least published) any evidence that shows the 2004/05 reforms were not achieving the objective. This failure is particularly surprising given that the 2005 Circular on the new major infrastructure rules explicitly said:

> ''The new arrangements will be monitored over a five-year period. Given the infrequency with which major infrastructure projects of national or regional importance come forward, it is thought that to monitor over a shorter period would not be constructive.''[24]

The same circular stated that:

> ''the purpose of the new inquiry procedures is to achieve significant improvements in the time taken to handle major infrastructure projects by streamlining the process and reducing unnecessary delays whilst continuing to ensure that adequate opportunity is given for people to have a say, to test evidence and to make a sound decision.''[25]

The Inspectorate currently has considerable powers available to it to deal with vexatious and repetitious evidence or otherwise to control its own procedures so as to ensure that the inquiry proceeds expeditiously whilst ensuring that evidence is properly tested and members of the public who will be directly affected by decisions can be heard.[26]

Citizen involvement and the right to be heard

One of the most serious concerns surrounding the Planning Bill relates to the lack of meaningful opportunities for public participation in the process and in particular the lack of any right to be heard in the determination of applications for development consent.

No discussion of this issue can take place without consideration of the Aarhus Convention. The Convention explicitly recognises ''the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection'' (Recital). Article 7 provides that:

> ''Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.''[27]

It is true that Aarhus is stronger on principle than precise standards but the ambition of increasing citizen participation in decision making stands in stark contrast to the provisions of Planning Bill.

[24] ODPM Circular 07/2005 para.5.

[25] ODPM Circular 07/2005 para.4.

[26] ODPM Circular 07/05 actively promotes the use of round-table sessions, statements of common ground and use of outline statements.

[27] The applicable paragraphs of Art. 6 require that participation be given adequate time frames, be carried out at a time when all options are open, and that the results of such participation be taken into account in the decision-making process.

In unpicking the impact of the new regime it is useful to ''walk through'' the Bill as a concerned member of the public—perhaps a member of the public whose property might be subject to compulsory purchase in order to make way for a runway.[28]

Our first involvement with the system will be when the Government consults on a draft National Policy Statement. The Bill requires the Secretary of State to carry out such consultation as she ''thinks appropriate''.[29] Where the proposal designates a particular location as suitable (how many sites are suitable for a third runway at Heathrow?) then she must consult the relevant local authority to decide what steps are appropriate. Beyond that there are no minimum requirements for such consultation other than that the Secretary of State must have regard to the responses to the consultation (a common law requirement in any event). Other common law (and Aarhus) requirements—such as the need to ensure that consultation is carried out at a stage when the process is at a formative stage and options are open to change—are not even included.

Importantly, there is no suggestion whatsoever that there would be any sort of oral hearing at which members of the public would have a right to make oral representations even in a situation when the draft NPS identified a particular location (say our fictional citizen's home) as suitable for development. What is envisaged is, so far as the public is concerned, a standard Government consultation supplemented by whatever the parliamentary process might offer.[30]

But the effects of an NPS are enormous. NPSs are a sort of super-policy or (where location specific) a super-development-plan. An application for development consent must be, in effect, determined in accordance with the NPS (subject to four specific exceptions[31]). In the local planning regime a planning application must be determined in accordance with the development plan unless material considerations (much broader than the limited exceptions) indicate otherwise. Under the 2004 legislation the Development Plan Documents (DPDs) would only have been adopted following a public examination in respect of which any member of the public would have had a right to be heard.[32] This right reflects the site specific nature of allocations in these plans.

The ambition of government for location specific (which means in the case of nuclear site specific) NPS leads us to a very curious position where local DPDs are site specific but there are clear rights to be heard; Regional Spatial Strategy (RSS) no right to be heard but not site specific (invitation only); NPS site specific but no right to be heard. The lack of any consideration about meaningful safeguards for people in testing this critical strategic policy is a major omission. People's involvement in NPS will be relegated to standard and passive consultation.

The status of an NPS as a super-development-plan which trumps almost all other considerations is also intended to significantly narrow the scope of the issues to be considered by the Commission. The idea for this aspect of the reform was floated originally in proposed (but abandoned) changes to the Major Infrastructure Projects system in 2001 and then reinvigorated in the context of the dash for

[28] CLG made changes to the Bill at Report stage which they described as 'concessions'. These included a review of the Bill in two years and a new clause (CL 90) entitling those undergoing compulsory purchase to a public hearing. In practice this new clause simply confers the opportunities of the open floor session on a group who would have already enjoyed this right. Critically the new clause does not confer rights of cross-examination for those undergoing compulsory purchase.

[29] Clause 7(2).

[30] The parliamentary process is not yet finalised but is likely to take the form a special select committee. Because such a committee is not the final decision maker, its not clear that it would provide a satisfactory mechanism to hear individuals directly affected by site specific NPS.

[31] Clause 101.

[32] Whilst s.8 PCPA 2004 provides that a member of the public does not have a right to be heard in the preparation of an RSS, s.20(6) explicitly provides that members of the public do have a right to appear before and be heard by the Inspector.

nuclear power as set out in the DTI report ''The Energy Challenge'' (2006) which recommended that the inquiry ''should focus on the relationship between the proposal and the local plans, and local environmental impacts. The inquiry should address these issues in the context of the national strategic considerations, which will already have been established''.[33] In the earlier context the proposed changes were defeated by the succinct argument advanced by FOE and others: ''Your new power station goes here—(what colour would you like the gates)?'' The point applies with even more force to the current reforms—yet this time the debate is in real danger of being lost.

Let us assume that an NPS is duly made that identifies the site of this person's home as suitable for a new runway. At this stage he does have a right to mount a legal challenge by way of statutory review.[34] It may well be an important unintended consequence that such challenges will be made—particularly as the person will know (a) that the NPS will effectively determine the outcome of an application; and (b) that there will be almost no opportunity for meaningful participation in decision making further down the line. What is likely to happen is that these highly controversial debates will end up being shifted to the much less appropriate setting of the High Court rather than a public inquiry: and the Court will need to decide whether the inability of persons to make meaningful representations about site specific NPS (particularly where an individual's home is designated as a location for new infrastructure) means that they need to engage in a much more ''merits'' based review than in other planning contexts.

If the Government is determined to prepare national statements which are site specific and technology specific then the following minimum safeguards would need to be in place:

- Issues and options stage where full consideration of alternatives takes place which satisfies the SEA Directive. This would require direct participative techniques applied to those communities affected as well as wider opportunities for public response through traditional and e-media.
- Publication of draft NPS.
- Formal period of representations and objections (Anyone who makes a representation will have a right to be heard as with normal plan making).
- Examination where representations can be heard (best delivered by PINs).
- Parliamentary Approval.

In due course a developer decides to bring forward an application to build a new runway through his home. Before the developer can do so he must consult the public.[35] The Government has repeatedly placed emphasis on this stage of consultation in support of their claim that the new system provides more rights than under previous planning regimes.

One of the foundational principles of effective participation is that the public are involved at an early stage of the development. The new requirement for an agreed statement of consultation method and the requirement for such consultation to be carried out is welcome. However, this process is no compensation for the wider loss of rights and is something of a diversion. First, this is a consultation carried out by the developer—and not by the public authority. Members of the public will naturally have concerns about the extent to which such a developer will respond meaningfully

[33] The Energy Challenge (2006) p.162.
[34] Clause 13.
[35] Clause 41.

to such consultation and the extent to which such consultation is impartial. Secondly, bearing in mind the nature of the projects and the fact that the commercially motivated developer is carrying out the consultation, one wonders whether there is any realistic prospect that any such proposal would ever not be pursued as a result of consultation responses.

This process highlights as clearly as any the significant difference between ''consultation'' and ''participation''. Participation means active involvement in the decision making process. It includes dialogue, reflection and reconsideration. That is why the Aarhus Convention talks of public participation and not consultation—the concepts are quite different. The reality is that members of the public are not going to be able meaningfully to participate in environmental decision making through a developer controlled consultation.

Following the developer consultation an application for development consent is made to the IPC. What rights does our member of the public have at this final stage? The Government claims both that such a person has a right to be heard and that he has ''exactly the same rights'' as he currently has.

The Planning Bill explicitly provides[36] that the IPC's examination of the application is to take the form of written representations. The exceptions are narrowly drawn and include a legal threshold of ''necessity''.[37] Even if this minimal standard is legally safe it does not in any way satisfy the wider test of good governance. *There can be no meaningful right to be heard in a written process* and written representations are at least as daunting to the lay person as an inquiry and in some cases more so. Even where a hearing does take place on a particular issue then cross-examination is explicitly excluded (questioning being reserved to the panel) other than in ''exceptional''[38] circumstances and again subject to a test of ''necessity''. But cross-examination is a crucial element of any meaningful right to be heard and is an important part of the current system of major infrastructure planning inquiries. That is not because of a desire to be adversarial but because this is a context in which planning inspectors (now the IPC) are required to make complex factual decisions in the face of directly conflicting evidence on highly technical issues. In the absence of the right to cross-examine there must be a significant risk that cases will not be properly examined and bad decisions will be made.

The basis for the ''right to be heard claim'' comes from the provision requiring an ''open-floor'' hearing.[39] This part of the hearing is now widely described (or derided) as the ''open-mic'' session. But this type of add-on session is of extremely limited value. It is in effect not a ''right to be heard'' as we currently understand it but a right to make a statement. The ''open-floor'' session is to a public inquiry as is ''Speaker's Corner'' to the House of Commons. It is an opportunity for a member of the public to ''vent''.

Importantly, the Government has repeatedly failed (despite invitations) to flesh out how the open-floor session would be structured and has failed to answer basic questions: will those speaking be able to bring their own witnesses to speak? Will they be able to present complex evidence from expert witnesses over an extended period? Will the developer be present? At what stage in the process will the open-mic session take place? In reality it is an add-on, divorced from the main part of the proceedings (which may have taken place in writing—therefore privately) and with very limited

[36] Clause 88(1).
[37] Clause 89(1).
[38] Clause 92(7).
[39] Clause 91.

ability to influence the main part of the proceedings. In almost every way the open mike session breaks with the principles of meaningful participation and relegates community involvement to a opportunity to ''sound off'' about the proposal.

The drive to remove the right to be heard is partly based on the Government's claim that cross-examination engenders ''an unconstructive culture of opposition among parties''. The difficulty with this is that it fails to recognise that opposition is inherent in the planning system and is particularly so in the context of major infrastructure projects. There are fundamental and serious disagreements about these issues. That is not because of a ''culture of opposition'' but because those disagreements represent different and legitimate views about the very important issue of how we use our land. Moreover, to talk of a culture of opposition in the context of compulsory acquisition is insulting to those on the receiving end of such orders. Opposition exists. The role of the system is to provide a fair arena in which to resolve divergent views whilst respecting the rights of those who will be affected by the decisions and those who seek to protect important public interests.

At the end of this process a development consent may be granted which will fundamentally change the area in which he lives and which may even result in his home being acquired compulsorily. And yet, the only guaranteed right to be heard throughout that process is in the form of a ''right to make a statement'' at the open-mic session.

Democratic accountability

One of the most important changes that will result from the Planning Bill is the wholesale removal of democratic accountability from the development consent system for major infrastructure projects.

Currently, the situation for major infrastructure projects[40] is that a Planning Inspector will make a report to the Secretary of State who will make the final decision. The Secretary of State is accountable to Parliament and to the public. Under the proposed system in nearly every case[41] the final decision will be made by the IPC.

The first point to note is the unprecedented power of the IPC. The IPC has power to grant consents across a wide range of regimes and to order compulsory acquisition. It also has power to modify or exclude legislation[42] (subject only to a need to provide a draft of such an order to the Secretary of State). Such power for an unelected person is wholly unprecedented.[43] The appointed Commission would therefore be empowered to change laws made by democratic bodies—a clear and significant contravention of the principle that laws are made by democratically elected persons under the ultimate authority of Parliament.

The move away from a decision made by the Secretary of State to one made by an appointed Commission is a fundamental departure from the history of the land use planning system in this country. At a stroke, planning changes from being a system of regulation carried out by our elected representatives in the public interest to a purely technocratic exercise. The Government's response

[40] Section 76A TCPA 1990 (as introduced by PCPA 2004) and the Town and Country Planning (Major Infrastructure Projects Inquiries Procedure) England Rules 2005 ('the 2005 Rules').

[41] The Secretary of State will be able to ''call-in'' for her own determination applications either where it would be in the interests of defence or national security or where there has been an unanticipated change in circumstances since the publication of the relevant NPS which would result in a materially different policy, and where there is an urgent need in the national interest for the application to be decided before the NPS is reviewed (Clause 102).

[42] Clause 116.

[43] Private and hybrid Bills sometimes modify existing legislation. Transport and Works Orders can also modify legislation (s.5(3) Transport and Works Act 1992) but those powers are exercised only by the Secretary of State.

to this accusation is to say that planning decisions by the Secretary of State are quasi-judicial and are subject to such constraints that they are not in any meaningful sense ''political''.

As the Courts have noted, it is a misnomer to describe Ministers' roles as quasi-judicial. In reality Ministers make administrative decisions for which they are politically accountable and in respect of which they have to act lawfully (including fairly). It is in respect of the latter constraint that they are accountable to the Courts. In respect of the former they are accountable to Parliament and to the public.

In *Alconbury*,[44] Lord Nolan made clear the Court's view as to the importance of democratic accountability in planning decisions in the following terms which provide an eloquent warning for the Government as it proceeds with this Bill:

> 60. . . . In the relatively small and populous island which we occupy, the decisions made by the Secretary of State will often have acute social, economic and environmental implications. A degree of central control is essential to the orderly use and development of town and country. Parliament has entrusted the requisite degree of control to the Secretary of State, and it is to Parliament which he must account for his exercise of it. To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would be profoundly undemocratic.

The following individual comment complements that account. Mike Ash, Chief Planner at ODPM until 2006, criticised the proposals for having the IPC determine major infrastructure planning applications:

> ''Despite delegation to officers or inspectors, judgement has until now been exercised by or in the name of accountable ministers and councillors. While this accountability may be at several removes, it is still vital. Accountability for underlying policy is not enough. Major infrastructure projects affect many and deciding between conflicting interests is rarely just a technical exercise. We should only give up on the principle of democratic accountability if there is overwhelming evidence of the need to do so. Despite the Eddington and Barker reviews, the evidence for the proposed changes is weak. . .''

Planning is an intrinsically value laden and political activity. Almost all serious planning proposals ultimately present key dilemmas as to the value of economic growth or bio diversity protection. Planners can help analysis and distil these arguments and ensure decision are made within the bounds of public law but ultimately, and especially in large scale cases, the decision has to be made by a Politian using their judgment and resting on their accountability to parliament and the people. While I have the highest regard for many of my senior planning colleagues I know of no one who could command the legitimacy to order the destruction of thousands of homes at Heathrow without provoking fierce and justifiable civil resistance. Technocrats cannot determine the public interest.

Taken as a whole the Planning Bill will be less fair and less democratic than even the current and imperfect framework. It is unlikely to be more timely and efficient given the scope for direct action and the strong possibility that delay will shift from the inquiry process and the Minister's in-tray to the High Court.

[44] *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions and other cases* [2001] UKHL 23.

The way ahead.

There have always been tensions between central control and local devolution, between community needs and national imperatives. The planning system has had to try and mediate between these competing interests and until now has done surprisingly well.

The publication of the Communities in Control White Paper and of the Planning Bill perfectly illustrates the Government's confusion over how much power to give to ordinary people and over what issue. The contents of the Planning Bill provide a clear signal, however, that with really important decisions communities are regarded not as an asset but as a threat and a problem to finding solutions. The Bill itself will lead to a period of polarisation and conflict after which it will be necessary to put the pieces back together. The final question is what would this system look like?

This is not a question of the detail of how to organise effective public participation, but instead is one of how to restore a coherent narrative to the place of people and planning.

First Principles.

It is important to establish a consensus about the democratic nature of planning and decision making. Democracy is not an optional extra, but a fundamental keystone of the system. The restoration of accountability in the planning of infrastructure would be the most important aspect of any reform. Flowing from this democratic function we have to be clear about how much power we are willing to give to communities. This is always going to be a contested arena, but the tendency to give communities control only over issues which don't really matter undermines the credibility of the system. We also have to be clear about the nature of public participation and its limits. In a democratic society public participation is not a veto on change. The concept of public participation has strong educative, reflective and empowering aspects and is designed above all to promote better understanding and communication between the promoter, the community and the decision makers. In many cases it leads to better development. Ultimately however, participatory processes must still be bound by a democratically accountable body reaching final decisions.[45]

Developing an evidence base.

It may be touchingly old fashioned, but it would be useful to have robust evidence of the sources of inefficiency in the system and therefore how to make the planning process more open and timely. Evidence is not the same as 'hearsay', nor special pleading by interest groups who cannot see beyond their own corporate needs. Proper analysis may suggest that managerial rather than endless structural reform is likely to be the most fruitful way ahead. In addition, the needs of those excluded from planning decisions need to be examined to understand if ideas like the funding of third parties at public inquiries is a useful way forward.

Procedural changes

It is important to build upon those aspects of the Planning Bill which do represent improvements. The integration of National Policy Statements into a national infrastructure plan which could deal effectively with climate and offer a coherent moment for effective public participation would be a positive step forward. The development of specialist advice to the promoters of large schemes along

[45] Friends of the Earth Submission of Evidence Planning Bill Analysis December 2007.

the lines of the ATLAS programmes would reduce delay. As would the effective case management of large inquiries, a feature absent from the T5 case. The enhanced role for local government in the organisation of public participation on major projects would increase legitimacy. Clear time limits for Ministerial decision making would reduce uncertainty while retaining democracy.

Changing the culture of planning

Planning should be a positive and visionary process, but this requires a radial culture change in the United Kingdom. There is much to be learned from the more mediated and consensual planning process of the Nordic nations where building collaborative consensus is not regarded as ''soft''. Communities, NGOs and businesses all need to be challenged to raise their game. The Planning Bill illustrates that the Government is not capable of sensible reform measures, and perhaps it is time for the planning community to agree its own programme of change.

Conclusion

The Government's planning reform agenda has set back the debate on public participation. However, in polarising the planning community it has, at least, forced us to confront and re-examine our principles. Organisations such as the CBI and RTPI have backed the Government's Planning Bill while a raft of environmental groups have equally vociferously condemned them. The real task of good government is to not encourage unnecessary division. It should be possible to have a democratic and rights based planning system that is also timely and efficient. This relies on recognition of the difference between due process and unnecessary administrative delay.

Above all there is need for a settled period of consensus as to the core value of planning. Endless reform and changes to process based only on the needs of the business community will inevitably lead to a distorted system which meets no-one's aspirations. Ultimately everyone benefits from a system which is open and legitimate. Even if we disagree on outcomes, we must all have confidence in the process of decision-making.